TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 640

UNITED STATES OF AMERICA, PETITIONER,

versus

FRED ORBETEIT, CLAIMANT OF 16 ARTICLES OF DEVISE, MORE OR LESS, LABELED "SINUTHERMIC," ETC., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. —

UNITED STATES OF AMERICA, PETITIONER,

versus

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVISE, MORE OR LESS, LABELED "SINUO-THERMIC," ETC., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA,

UNITED STATES COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT

Pleas and Proceedings had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1948, at New Orleans, Louisiana, before the Honorable Samuel H. Sibley, the Honorable Joseph C. Hutcheson, Jr., and the Honorable Edwin R. Holmes, Circuit Judges:

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC", ETC., APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Be It Remembered, That heretofore, to-wit, on the 7th day of July, A. D. 1947, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Northern District of Florida, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Court of Appeals as No. 12033, and that on the 27th day of December, A. D. 1948 the mandate of the Supreme Court of the United States in said case was duly filed, and that the following proceedings were had subsequent to the filing of said mandate of the Supreme Court, to-wit:

1 *Motion of the United States to Affirm Decree of Condemnation, Filed January 15, 1949*

In the United States Court of Appeals for the Fifth Circuit

No. 12033

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE LABELED "SINUOTHERMIC", ETC., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Motion to Affirm Decree of Condemnation

The United States of America moves that the decree of condemnation entered by the United States District Court for the Northern District of Florida on January 27, 1947, be affirmed.

Statement of facts

This case was decided in this Court on November 7, 1947. Judgment was entered reversing the decree of condemnation and remanding the case to the district court for proceedings not inconsistent with the Court's opinion (R. 179-183 and 164 F. 2d 245). The reasons for reversal were (1) that the trial court erred in holding that the leaflet "The Road to Health" constituted labeling within the meaning of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321(m)]; (2) that the court below erred in refusing to hear the testimony of 30 patients as to "whether their external symptoms abated and their pains ceased" when treated with the machines; and (3) that the trial judge erroneously refused to accept the testimony of Dr. Urbuteit to establish the diagnoses of the patients' diseases and ailments.

2 A petition for certiorari, restricted to the issue whether the leaflet constituted labeling, was granted on April 19, 1948 (R. 185). On November 22, 1948 the Supreme Court of the United States reversed and remanded the case to this Court. (No. 13, October Term 1948, 93 L. Ed. 79). The Court held that the leaflet was labeling within the meaning of the Act. The mandate was returned on December 22, 1948.

Grounds for Affirmance

1. The decree should be affirmed because of labeling representations as to diagnostic capabilities of the machines which all the evidence, including Dr. Urubteit's admissions, shows are false.

The leaflet, "The Road to Health", in part describes the diagnostic capabilities of the machines as follows:

Importance of Examination

You must realize the all importance of being examined the Sinuothermic way, which leaves out all guess work as Sinuothermic locates the cause and registers exactly [p. 1, col. 3].

* * * * * * * * *

Cancel Danger Signal

* * * At the Sinuothermic Institute no one is ever treated without first being thoroughly examined, and it should be remembered that NO really COMPETENT doctor will treat a condition that might be a cancer without first making a caseful examination. INSIST on a thorough examination no matter who your doctor is. Be examined with Sinuothermic which registers exactly and never makes a mistake [p. 1, col. 4].

* * * * * * * * *

3 Be Examined

Why have someone guess at what your ailment is when at the Sinuothermic Institute, Inc., you can be examined with that never failing Sinuothermic machine, which leaves out all guess work and registers exactly [p. 1, col. 4].

Sinuothermic Examination

Dr. Urbeit told them that he could not tell them anything until he examined her with Sinuothermic. The examination revealed that she not only had a tumor in the uterus but she was also pregnant about 5 months. * * * [p. 2, col. 6].

* * * * * * * *

Science At Its Peak

Sinuothermic is the last word in scientific discoveries. Sinuothermic is a tester of human tissue. You could liken Sinuothermic to the tester they use to test your radio tubes with * * * Sinuothermic registers exactly the condition of human tissue p. 2, col. 6.

The general representation that the machine "locates the cause" of any ailment and "registers exactly" appears frequently throughout the leaflet.

The evidence at the trial showed that the Sinuothermic machine consists of a number of electrical units mounted in a wooden cabinet (R. 39). The machine is designed to draw electricity from an ordinary household wall socket, to control the full line voltage (electrical pressure) by turning in variable amounts from zero to the full line voltage (115-120 volts), to step this voltage down to a maximum value of 60 volts, and to deliver current to the patient so that it will flow through the body between two pad electrodes that are applied to the bare skin (R. 39-44, 50-52, 164). The small machines differed from the master units only in the omission of the four indicating meters (R. 43, 164).

The evidence showed, further, that even the master model, which had four indicating meters, was incapable of registering any pathological changes in the body. This was because the meters were primarily affected by the patient's body resistance to electrical current and because internally the current is conducted through body fluids and not body tissues (R. 43, 51-52). The so-called treating units did not have the four indicating meters (R. 43). The expert testimony for the Government was that these machines were without value in the diagnosis of the disease conditions involved (R. 72, 76, 79-80, 83-85, 88-89, 91, 93, 96-97, 99-100, 104-105, 109-112).

4

Urbuteit described his method of "diagnosis" as follows: he said that when the current from the machine encounters a lesion in the human body, the meters will register "the amount of intensity or resistance there is in that particular area" (R. 126-127, 128-130). He admitted, however, that the machines alone are incapable of diagnosing any specific disease:

> The meters do not tell me what the ailment is, it merely registers when it is below normal. If it is normal it has a free flow; if it is not normal it has the obstructed flow, and according to the amount of obstruction that also indicates the severity of the ailment itself. Then the doctor, himself, should know from other tests what the ailment is * * *. R. 129.
>
> * * * * * * * * *
>
> * * * There is no way of registering the kind of ailment or the name of an ailment. It merely locates where there is something wrong. Then whatever that something is wrong, it is necessary then to take chemical tests; or whatever tests is necessary to determine the name of the ailment that can also be done. But I find in all my experience it is not necessary to go to all that trouble to take those tests. As long as the patient gets well, that seems to be the first requisite [R. 129-130].

The expert testimony for the Government contradicted this claim that the machine could "locate where there is something wrong" (R. 76, 79-80, 93, 96-97, 99-100, 104-105, 109-112). The trial court found (1) that the leaflets claimed diagnostic capabilities and therapeutic effects for the machines in many conditions (R. 165, Finding 4) and that they represented that the machine will register the exact nature of any disease (R. 165, Finding 5); (2) that the master model was incapable of diagnosing disease by registering pathological changes in the body (R. 165-166, Finding 5); and that the principles on which the machines were claimed to operate were impossible of practical application with these instruments (R. 166, Finding 7). The falsity of the claims of diagnostic capability of the small models was treated under Finding 7. These findings of fact have never been challenged.

The misrepresentations as to diagnostic capacity were established in part by respondent's own admissions. His testimony was that the machines—even the ones that had meters—would not specifically diagnose what the patient's ailment was (R. 129-130). He said that the device "merely locates when there is something wrong." The Government's evidence was overwhelming that the machines could not do even that. This Court, in its opinion, pointed out that Urbuteit's testimony "only claimed the machine to be an aid in diagnos-

ing"; that his testimony was that the machine "did not indicate any particular disease but only located the spot where the abnormal tissue was" after which "it was then a matter of judgment as to what the disease was" (R. 182, 164 F. 2d 245, 247).

The labeling claims are irreconcilable with this testimony. They assert that the machine "leaves out guess work"; that it "registers exactly and never makes a mistake"; and that it removes the necessity of having "someone guess at what your ailment is." Urbuteit's testimony implicitly admitted that those claims are falsehoods. The Government's evidence gave them the lie explicitly. The representations as to diagnostic capacity were false and on this phase of the case alone, the decree of condemnation should be affirmed. Any error in the exclusion of evidence which did not disprove the making of such misrepresentations would not defeat the Government's right to condemnation.

Under the Federal Food, Drug, and Cosmetic Act it is not necessary that the Government prove that the labeling representations are both false and misleading in all respects. Libelant is entitled to a decree of condemnation if it shows that any one of the various claims made in the labeling is either false or misleading in any particular. Section 502(a); *Goodwin* v. *United States*, 2 F. 2d
6 200, 201 (C.C.A. 6); *United States* v. *Six Dozen Bottles * * * Kuriko*, 158 F. 2d 667, 669-670 (C.C.A. 7); and *United States* v. *One Device * * * Colonic Irrigator*, 160 F. 2d 194, 200 (C.C.A. 10).

The evidence which this Court held improperly excluded was offered to prove that claims of therapeutic or curative value made for the machines were true (R. 158-163). It had no relationship to the truth or falsity of claims of diagnostic ability. This Court held that the evidence as to diagnoses was erroneously excluded *because Urbuteit used the machines only as an aid in diagnosing*, and that the patients should have been permitted to state *whether their external symptoms abated and their pains* ceased (R. 182-183, 164 Fed. 2d 247). The admission of the evidence within those limits would have had no bearing upon the capabilities of the machines as instruments for diagnosing disease.

Since it appears from the undisputed testimony and from the admissions of Urbuteit that the machines are incapable of diagnosing specific conditions, and since the machines were represented as having such diagnostic capabilities, a decree of condemnation should be entered irrespective of whether the court below was correct in holding other evidence relating to the curative value of the machines improperly excluded. The appellant was not prejudiced by the exclusion of this evidence and the ruling of the trial court was not reversible error. *Ross Lumber Co.* v. *Hughes Lumber Co.*, 264 Fed. 757, 760 (C.C.A. 5), certiorari denied, 254 U. S. 635; *Nalban-*

tiah v. United States, 54 F. 2d 63, 64 (C.C.A. 7), certiorari denied, 285 U. S. 536; *Jennings v. United States*, 73 F. 2d 470, 471 (C.C.A. 5). Accord: *Holloway v. Dunham*, 170 U. S. 615, 618.

Conclusion

For the foregoing reasons, the appellee respectfully submits that the decree of condemnation should be affirmed.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

(Signed) GEORGE EARL HOFFMAN,
United States Attorney for the Northern District of Florida.

7 *Opinion of the Court—Filed February 1, 1949*

In the United States Court of Appeals for the Fifth Circuit

No. 12033

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC", ETC., APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Florida

(February 1, 1949)

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

BY THE COURT: Our judgment in this case, reported 164 Fed. (2) 245, was reversed in *United States vs. Fred Urbeteit*, U. S. , , and the cause remanded to us for further proceedings in conformity with the opinion of the Supreme Court. The reversal was on the one point, that certain advertising matter shipped separately from any of the machines and held by us for that reason not to have "accompanied" any of them might nevertheless constitute "labeling", if the movements of advertising and machines in interstate commerce were a single interrelated activity and not separate or isolated ones. There were four or five shipments of machines several weeks apart; and only one shipment of advertising. It does not appear whether there was a single
8 interrelated activity in machines and advertising as to each shipment, or as to which shipments. That appears to be a question which should be further investigated.

The Supreme Court did not disturb our former ruling that the district court should have heard all the evidence offered on the question of the falsity of the advertising. We adhere to that ruling. The judgment of the district court is accordingly reversed and the cause remanded for further proceedings in conformity with the opinion of the Supreme Court and with this opinion.

Judgment Reversed.

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9 Judgment

Extract from the Minutes of February 1, 1949

No. 12033

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC", ETC.

versus

UNITED STATES OF AMERICA

This cause having been remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court of the United States;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the District Court of the United States for the Northern District of Florida, be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of the Supreme Court and of the opinion of this Court.

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10 *Motion of Appellee and Order Staying Mandate Pending Petition for Certiorari—Filed February 12, 1949*

In the United States Court of Appeals for the Fifth Circuit

Docket No. 12033

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVICE LABELED "SINUOTHERMIC," ETC., APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

Motion for Stay of Mandate

Now comes the United States of America, appellee herein, and respectfully moves the Court for an order staying the mandate until

and including March 15, 1949, and in support of this motion respectfully shows to the Court that the Attorney General of the United States is submitting to the Solicitor General of the United States recommendation for certiorari for review of the opinion of this Court dated February 1, 1949, it appearing that the Circuit Court of Appeals for the Fifth Circuit in its opinion of said date does not conform to the opinion of the Supreme Court of the United States in said cause which held

> "That the movements of machines and leaflets in interstate commerce were a single interrelated activity not separate or isolated ones"

and it appearing that the Circuit Court of Appeals for the Fifth Circuit did not consider the question whether the Government was entitled to affirmance of decree of condemnation because of false character of advertising with respect to diagnostic capabilities of machines.

That the stay of mandate until and including March 15, 1949 is needed so that the Solicitor General of the United States may make the necessary determination, and thereafter until the Supreme Court of the United States disposes of the petition for certiorari.

11 Respectfully moved this 10th day of February, 1949.

UNITED STATES OF AMERICA,
Appellee,
By ALEXANDER M. CAMPBELL,
Assistant Attorney General,
Washington, D. C.
By (Signed) GEORGE EARL HOFFMAN,
United States Attorney,
Pensacola, Florida.

12 United States Circuit Court of Appeals for the Fifth Circuit

No. 12033

FRED URBETEIT, CLAIMANT OF 16 ATICLES OF DEVICE, MORE OF LESS, LABELED "SINUOTHERMIC", ETC., APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

On Consideration of the Application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein to enable Appellee to apply for and to obtain a writ of cer-

tiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 12th day of February, 1949.

(Signed) E. R. HOLMES,
United States Circuit Judge.

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13 Clerk's Certificate

United States of America,

United States Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 1 to 14 next preceding this certificate contain a full true, and complete copy of all the proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court numbered 12033, wherein Fred Urbeteit, Claimant of 16 Articles of Device, more or less, labeled "Sinuothermic", etc., is appellant, and United States of America is appellee, as full, true and complete as the originals of the same now remain in my office, said proceedings, etc., being filed subsequent to the filing of the Mandate of the Supreme Court of the United States in said case in said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of February, A. D. 1949.

OAKLEY F. DODD,
Clerk of the United States Court of Appeals, Fifth Circuit.

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No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PETITIONER

v.

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELLED "SINUTHERMIC", ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 640

UNITED STATES OF AMERICA, PETITIONER

v.

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC", ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays (1) that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Florida condemning certain devices as misbranded under Section 304 of the Federal Food, Drug, and Cosmetic Act, and remanding the case to the District Court for further proceedings in conformity with the earlier opinion of this Court (No 13, this Term, 335 U. S. 355) and

the opinion of the Court of Appeals, and (2) that the judgment of the Court of Appeals be reversed and the cause remanded to it with directions to consider the question whether the Government is entitled to a decree of condemnation by reason of the false and misleading character of the advertising matter involved in this case as respects the diagnostic capabilities of the devices.

OPINIONS

The opinion of the Court of Appeals on the remand of the cause by this Court (R. 6-7) is not yet reported. The earlier opinion of the Court of Appeals (No. 13, this term, R. 179-183) is reported at 164 F. 2d 245. The opinion of this Court reversing the earlier judgment of the Court of Appeals is reported at 335 U.S. 355.

JURISDICTION

The judgment of the Court of Appeals was entered February 1, 1949 (R. 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated the mandate of this Court in *United States* v. *Urbuteit*, 335 U.S. 355, in remanding the case to the District Court with directions to retry the question whether there was a single interrelated activity in the interstate movements of the machines and advertising matter involved as to each such shipment or any of them.

2. Whether the Court of Appeals complied with the mandate of this Court in failing to consider whether the Government is entitled to a decree of condemnation because of the false character of the advertising matter as respects the diagnostic capabilities of the devices.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U.S.C. 301 *et seq.*), provides in pertinent part:

SEC. 201. For the purposes of this Act—

* * *

(h) The term "device" * * * means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; * * *.

* * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court

of the United States within the jurisdiction of which the article is found. * * *

SEC. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

STATEMENT

On January 9, 1947, a second amended libel of information was filed in the United States District Court for the Northern District of Florida, under Section 304 of the Federal Food, Drug, and Cosmetic Act, seeking the seizure and condemnation of 16 articles of device labeled "Sinuothermic" (No. 13, R. 11-15). The libel alleged that the devices were misbranded within the meaning of Section 502(a) of the Act when introduced into and while in interstate commerce in that representations made in leaflets entitled "The Road to Health", relative to the curative and therapeutic powers of the device in the diagnosis, cure, mitigation, treatment, and prevention of disease, were false and misleading. It was charged that the leaflets, which had been shipped physically apart from the devices, had accompanied the devices in interstate commerce so as to constitute "labeling" under the definition of that term contained in Section 201 (m) of the Act.

In addition to many representations of curative value involving, among many others (see No. 13, R. 165), such various diseases as cancer, tuberculosis, diabetes, and heart disease, the leaflet, "The

Road to Health" represented that the machines were capable of diagnosing the cause of any ailment.[1] The Government's evidence showed that the device was without value in the diagnosis of the disease conditions indicated (No. 13, R. 72, 76, 79-80, 83-85, 88-89, 94, 93, 96-97, 99, 100, 104-105, 109-112), and respondent Urbuteit admitted that the device alone was incapable of diagnosing disease (No. 13, R. 129-130).

The trial court found, *inter alia*, that the leaflets had accompanied the devices while in interstate commerce (No. 13, R. 164); that the leaflets claimed diagnostic values and therapeutic effects for the machines in many conditions (No. 13, R. 165, Finding 4); that the master model was incapable of diagnosing disease (No. 13, R. 165-166, Finding 5); and that the claims of therapeutic and curative effect were false and misleading (No. 13, R. 166). Accordingly, the court entered a decree condemning the devices (No. 13, R. 168-169).

On appeal, the court below reversed the judgment and remanded the cause for further proceedings on the grounds (1) that since the leaflets had been shipped apart from the devices, they did not accompany them while in interstate commerce and hence did not constitute labeling within the meaning of the Act, and (2) that the trial court erred in excluding certain testimony offered by respond-

[1] The leaflet is not reproduced in the record in No. 13, but copies are on file with the Clerk. See the excerpts from the leaflet quoted in our brief in No. 13, pp. 6-7.

ent as to the curative value of the devices (No. 13, R. 179-183; 164 F. 2d 245).

Thereafter, on petition by the Government, this Court granted certiorari (333 U. S. 872) and heard the case together with the companion case of *Kordel* v. *United States* (No. 30, this Term, 335 U. S. 345). The Government urged that the relationship of the leaflets to the devices was such that they constituted labeling within the meaning of Section 201(m) of the Act. The Government also contended that even if it were assumed that the District Court erred in excluding the proffered evidence relating to the curative value of the machines, the Government was entitled to a decree of condemnation (if it prevailed on the "accompaniment" issue), since it appeared from the undisputed testimony and from respondent's own admissions that the machines did not possess the diagnostic capabilities claimed for them. This Court held that the leaflets did accompany the devices so as to constitute labeling under the Act, saying that "In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a single interrelated activity, not separate or isolated ones" (335 U. S. at 357). In reversing the judgment of the Court of Appeals, this Court did not disturb the ruling below that the District Court was wrong in excluding respondent's proffered testimony, and the Court said that "since the cause must therefore be remanded to the

Court of Appeals, the question whether the Government was entitled to a decree of condemnation because of the falsity of the claims made in the leaflets in respect of the diagnostic capabilities of the devices would be open for consideration by that court, together with any other questions that had survived.

On the remand, the Government filed a motion in the Court of Appeals to affirm the decree of condemnation, urging, as we did here (see our brief in No. 13, pp. 37-41), that error in excluding the testimony relating to curative properties of the device did not affect the Government's right to such a decree on the basis of the undisputed evidence of misbranding in falsifying its value in diagnosing diseases (R. 1-6). The Court of Appeals did not consider this contention. Instead, it construed the opinion of this Court as holding merely that "certain advertising matter shipped separately from any of the machines and held by us for that reason not to have 'accompanied' any of them *might* nevertheless constitute 'labeling,' *if* the movements of advertising and machines in interstate commerce were a single interrelated activity and not separate or insolated ones." (Italics supplied.) After adverting to the fact that there were several shipments of the devices and only one shipment of the leaflets, the court below said: "It does not appear whether there was a single interrelated activity in machines and advertising as

to each shipment, or as to which shipments. That appears to be a question which should be further investigated." The court adhered to its earlier ruling that the trial court erred in excluding respondent's proffered testimony referred to above, and concluded that the judgment should be reversed and the cause remanded to the District Court "for further proceedings in conformity with the opinion of the Supreme Court and with this opinion." (R. 6-7.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In remanding the case to the district court with directions to retry the question whether there was a single interrelated activity in the interstate movements of the machines and advertising matter as to each shipment of the machines or any of them.

2. In failing to consider whether the Government was entitled to a decree of condemnation by reason of the falsity of the diagnostic claims made for the devices, notwithstanding the error of the district court in excluding respondent's proffered evidence relating to their curative value.

REASONS FOR GRANTING THE WRIT

It is apparent, we think, that the Court of Appeals has failed to comply with the mandate of this Court in two respects.

First. The principal issue before this Court when the case was here earlier this term was whether the leaflets "accompanied" the devices and so constituted "labeling" within the meaning of Section 201(m) of the Act. The District Court held that they did, but this holding was reversed by the Court of Appeals. In reversing the judgment of the Court of Appeals, this Court said that although the leaflets were shipped separately from the machines—

> * * * It was the leaflets that explained the usefulness of the device in the diagnosis, treatment, and cure of various diseases. Measured by functional standards, as § 201 (m) (2) of the Act permits, these leaflets constituted one of the types of labeling which the Act condemns.
>
> The power to condemn is contained in § 304 (a) and is confined to articles "adulterated or misbranded when introduced into or while in interstate commerce." We do not, however, read that provision as requiring the advertising matter to travel with the machine. The reasons of policy which argue against that in the case of criminal prosecutions under § 303 are equally forcible when we come to libels under § 304 (a). Moreover, the common sense of the matter is to view the interstate transaction in its entirety—the purpose of the advertising and its actual use. *In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a*

single interrelated activity, not separate or isolated ones. [335 U. S. at 357; italics supplied.]

Notwithstanding this clear holding, the Court of Appeals interpreted this Court's opinion as meaning merely that it was wrong as a matter of law in its view that a separate shipment of advertising matter could not constitute labeling; and that in this case the leaflets "might" have been labeling "*if* the movements of advertising and machines in interstate commerce were a single interrelated activity and not separate or isolated ones" (R. 6; italics supplied). The Court of Appeals thought that this question "should be further investigated" (*ibid.*) and accordingly reversed the judgment of the District Court and remanded the case with directions which in effect require a retrial of the issue. But that issue was resolved by the holding of this Court that the leaflets did accompany the machines involved in this proceeding and did constitute labeling within the meaning of the Act. Manifestly, the District Court cannot comply with both the opinion of this Court and the opinion of the Court of Appeals. We think it is clear, therefore, that the judgment of the Court of Appeals must be reversed with directions to abide the decision of this Court on this issue.

Second. The Court of Appeals has also failed to comply with the mandate of this Court in an-

other important respect. As we have pointed out, the Government contended before this Court that it was entitled to a decree of condemnation even if the Court of Appeals was correct in holding that respondent's proffered evidence as to the curative properties of the devices was improperly excluded by the District Court, since it appeared from undisputed evidence and from the admissions of respondent himself that the devices did not possess the diagnostic capabilities claimed for them in the leaflets. This Court said that it was not inclined to disturb the Court of Appeals' ruling on the admissibility of respondent's evidence and that since the case must therefore be remanded to the Court of Appeals, the issue raised by the Government's contention "will be open for consideration by it." (335 U. S. at 358.)

The Court of Appeals, however, did not consider the Government's contention; instead, it merely expressed adherence to its earlier ruling that the testimony offered by respondent should have been admitted (R. 7). We submit that under this Court's mandate the Government is entitled to a decision on the question whether the devices are subject to condemnation on the basis of the false claims in respect of their diagnostic value. If that question, the only one surviving in the case, is decided favorably to the Government, the decision will terminate the litigation and, if not, such ques-

tions as remain will be clarified for the guidance of the District Court.

CONCLUSION

For the reasons stated, we respectfully submit that this petition should be granted and that the judgment of the Court of Appeals should be reversed and the case remanded to it with appropriate directions in accordance with the earlier opinion of this Court. Since the issues presented involve only the correct construction of this Court's mandate, we respectfully suggest that, subject to respondent's right to file an opposing brief, the case may properly be disposed of without further briefs or argument.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

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Supreme Court of the United States

640

OCTOBER TERM, 1948.

No. 640.

UNITED STATES OF AMERICA, PETITIONER,

VS.

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELLED "SINUOTHERMIC," ETC.

BRIEF FOR THE RESPONDENT.

H. O. PEMBERTON,
Tallahassee, Florida,
Counsel for Respondent.

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STATEMENT.

The complete record of the trial in the District Court, proceedings in the Court of Appeals and the briefs of counsel before this Court appear in the files of this Court (No. 13, October Term, 1948) and this Court's opinion thereon in 335 U. S. 355.

The case was remanded by this Court to the Court of Appeals for further proceedings, whereupon the Court

of Appeals again considered the case, wrote a new opinion (R. 6—not yet reported) reversing the District Court and remanded it to that Court for further proceedings in conformity with the opinion of this Court and the opinion of the Court of Appeals.

Petitioner questions the rightness of the opinion of the Court of Appeals and contends that:

1. The Court of Appeals violated this Court's mandate in remanding the case to the District Court with directions to further investigate the facts as to the relationship between advertising and the several shipments of machines; and

2. The Court of Appeals failed to comply with the mandate of this Court when it did not specifically mention in its opinion the claim of the Government that it is entitled to a decree because of what it claims to be the false character of the advertising matter as respects the diagnostic capabilities of the devices.

SUMMARY OF ARGUMENT

The petition should not be granted because:

1. The Court of Appeals has simply directed the District Court to apply the statutory construction made by this Court to the facts of the case and has not violated the mandate.

2. The Court of Appeals considered the question of whether or not the Government should be entitled to a decree and decided it in the negative.

ARGUMENT.

1. The Court of Appeals has not violated the mandate of this Court.

In its opinion this Court construed a statute and in the making of that construction said "In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a single interrelated activity, not separate or isolated ones" (335 U. S. at 357).

This Court made no effort to sift the evidence and see if each and every of the shipments and of the machines were part of a single interrelated activity with the one shipment of advertising matter—for such a sifting was not necessary to a construction of the statute involved—but that is what the Court of Appeals has done in carrying out the mandate of this Court, and it has found that the evidence is not definite and has directed the District Court to investigate that question more carefully on a new trial in the light of this Court's enunciation of the principles involved. That is plain common sense. An examination of the record of proceedings in the District Court will disclose that the only time machines and advertising matter were shown to be together in any manner was on September 5, 1945, when an inspector for the Food and Drug Administration saw four leaflets in the office of Dr. Kelsch (R. 17—Case No. 13, October Term, 1948), whereas the last shipment of machines was not even delivered to the Express Company in Tampa, Florida, until September 21, 1945. There is no evidence to show what, when

or how any of the machines or the advertising matter were ordered except the testimony of Dr. Kelsch that he discussed getting some machines and literature with Dr. Urbuteit while in Tampa in June, 1945 (R. 29—Case No. 13). The evidence is skimpy. The situation might be illustrated by comparing it to the shooting of a man by some person in a crowd of twenty people. The man was shot but it is necessary to show which one of the twenty people did the shooting. Figuratively speaking, this Court has determined that a man was shot. The Court of Appeals has informed the District Court that this Court has decided that a man was shot but points out that the evidence does not show just who in the crowd is guilty and therefore directs the District Court to investigate the facts and determine just which one did the shooting.

The Court of Appeals has not violated this Court's mandate but has simply directed the District Court to apply the principles enunciated by this Court in an orderly manner in conformity to sound principles of justice.

2. The Court of Appeals did not fail to consider the question of whether or not the Government should have a decree on the evidence as to false claims regarding diagnosis.

The only basis for petitioner's claim that the Court of Appeals failed to consider the question is the absence of comment thereon in the opinion. It is a common practice in all courts to omit from an opinion or order any reference to some questions that are raised by counsel and considered by the court. If this Court denies the

petition now being argued without discussing in its order each question raised will that mean the Court failed to consider the questions? The answer is obvious.

If petitioner actually thought the Court of Appeals had in some way overlooked the question and the lengthy argumentative motion (R. 1) thereon, petitioner would have filed a petition for a re-hearing. The insertion in the Petition for Certiorari of the charge that the Court of Appeals failed to consider the question is simply an effort to have this Court review the adverse ruling of the Court of Appeals on a question which this Court has already refused to pass on.

CONCLUSION.

Respondent respectfully submits that there is nothing for this Court to review and that the Petition for Certiorari should be denied.

H. O. PEMBERTON,
Tallahassee, Florida,
Counsel for Respondent.

April, 1949.